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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 273

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, MEMPHIS UNION STATION COMPANY, AND UNION RAILWAY COMPANY, *Petitioners*,

v.

INTERSTATE COMMERCE COMMISSION, CITY OF MEMPHIS, TENNESSEE, AND RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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v.

INTERSTATE COMMERCE COMMISSION, CITY OF MEMPHIS, TENNESSEE, AND RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled actions on March 31, 1966.

Opinions Below

The memorandum decision of the District Court is reported as *Interstate Commerce Commission* v. *Memphis Union Station Co.*, 230 F. Supp. 456, and is printed as Appendix B hereto, *infra*, pp. 7a-25a. The opinion of the Court of Appeals is not yet reported and is printed as Appendix D hereto, *infra*, pp. 36a-50a.

Jurisdiction

The judgments of the Court of Appeals were entered on March 31, 1966. Appendix E, *infra*, pp. 51a-55a. A timely petition for rehearing filed by the petitioners Louisville and Nashville Railroad Company and Illinois Central Railroad Company on April 19, 1966, was denied on May 6, 1966. Appendix F, *infra*, p. 56a. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Whether Interstate Commerce Commission approval is required by Section 1(18) of the Interstate Commerce Act before a carrier by railroad may relocate its passenger station facilities, where no abandonment of track is involved apart from "stub-end" station tracks, which lead only from the station users' mainline tracks to station platforms and buildings and which are used only for loading and unloading of passengers, switching, storage, cleaning and repair of cars, and similar purposes.

2. Whether Commission approval is required by Section 5(2) and (4) of the Interstate Commerce Act before a carrier by railroad may use passenger station facilities owned by another railroad which it reaches from its own through-track on "stub-end" station tracks, which lead only from the mainline track to the station and which are used only for loading and unloading of passengers, switching, storage, cleaning and repair of cars, and similar purposes.[1]

Statutes Involved

The statutory provisions involved are Sections 1(18)-(20), (22) and 5(2), (4), (8) of the Interstate Commerce Act, added by 41 Stat. 477-478 (1920) and 48 Stat. 217-219

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[1] This question is applicable to petitioners Louisville and Nashville Railroad Company and Illinois Central Railroad Company only.

(1933), as amended, 49 U.S.C. §§ 1(18)-(20), (22), 5(2), (4), (8). They are printed as Appendix A, *infra*, pp. 1a-6a.

Statement of the Case[2]

For many years, petitioners Missouri Pacific Railroad Company ("MoPac"), Louisville and Nashville Railroad Company ("L&N"), Southern Railway Company ("Southern") and Illinois Central Railroad Company ("Illinois Central") have provided rail passenger service in interstate commerce to the City of Memphis, Tennessee. Petitioner Union Railway Company ("Union Railway"), a wholly-owned subsidiary of MoPac, owns the main line tracks used by the MoPac passenger trains to reach Memphis (App. 48a, 305a).

In 1909, the N. C. & St. L. Ry. Co. (later merged into L&N) and the MoPac, L&N, Southern and the St. Louis Southwestern Railway Company ("Cotton Belt")[3] organized the petitioner Memphis Union Station Company ("Union Station") for the purpose of constructing and maintaining a union passenger depot for the joint use of the proprietary railroads as tenants. The union station was completed in 1912, at which time the four railroads re-routed their passenger trains from their former stations in Memphis to the new union depot (App. 174a). Forty percent of Union Station's stock is owned by the L&N; each of the three other railroads owns 20% of the shares (App. 53a). The expenses of Union Station have been prorated among the proprietary railroads, as tenants, on a user basis (App. 49a).

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[2] Citations to "App." in this Petition are to the "Joint Appendix of Defendants-Appellants" in the Court of Appeals, a copy of which is included in the certified copy of the Record filed herein.

[3] The Cotton Belt was a defendant and appellant below. However, the injunction in this case does not order the Cotton Belt either to do anything or to refrain from doing anything, and in consequence the Cotton Belt is not a petitioner herein.

Union Station's property is located immediately north of the mainline tracks of the L&N, Southern and Union Railway on Broadway (App. 305a). To reach the Union Station tracks, passenger trains backed into the station from the mainline tracks on Broadway. They departed by the same route, the station tracks being "stub-end" tracks leading to nothing but the station building and related facilities (230 F. Supp. at 458-459, App. 174a-175a, Appendix B, *infra*, pp. 8a-9a). A map of the tracks appears in Appendix G, *infra*, p. 57a.

Prior to 1925, Union Station classified its station tracks as "mainline" tracks in reports filed with the Interstate Commerce Commission. In that year, however, the Commission ruled, in *Memphis Union Station Co.*, 97 I.C.C. 418, 423-424, 429 (1925), that the company "owns no mainline mileage" and characterized Union Station's tracks as "yard tracks and sidings." Since that time, Union Station, by order of the ICC, consistently has identified its tracks in reports to the Commission as "yard tracks" (App. 70a). The tracks provided access to the station and were used only for loading and unloading passengers, switching, storage, cleaning and repairing cars, and similar purposes (App. 255a-272a).

On November 1, 1952, the Cotton Belt discontinued its passenger service to Memphis by authority of the Arkansas Public Service Commission. Thereafter, it ceased to use Union Station (App. 33a-34a, 51a). No approval for this withdrawal by Cotton Belt was obtained from the Commission; nor did the Commission ever allege that this action required prior Commission approval.

The original agreement for the operation and use of Union Station expired April 1, 1962. Subsequently, MoPac, L&N and Southern extended the agreement another two years, to April 1, 1964 (App. 43-46a). Confronted with the

economic pinch of declining rail patronage and rising costs of operating Union Station (App. 49a, 59-60a),[4] none of the tenant railroads desired any further extension of the agreement. Upon the expiration date, both MoPac and Southern reactivated their former passenger stations in Memphis, and the L&N agreed with Illinois Central to share the use of the Illinois Central's station two blocks west of Union Station (App. 48a, 54a, 61-62a, 177a).[5]

On February 27, 1964, the Director of the Bureau of Finance of the Interstate Commerce Commission wrote to MoPac, L&N and Southern, inquiring as to their intentions and asking whether any abandonment was contemplated that required Commission approval (App. 20a, 28a-29a, 176a). Both MoPac and L&N, by written replies, confirmed their intention to leave Union Station at the expiration of the agreement and expressed their opinion that no Commission approval was required. Southern advised the Commission orally that if the other two railroads terminated operations at Union Station, it would have no alternative but to do likewise (App. 21a-22a, 29a-30a; 230 F. Supp. at 459-460, App. 176a, Appendix B, *infra*, pp. 9a-10a).

On March 16, 1964, the Commission's Director, Bureau of Finance, again wrote to the interested railroads, saying

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[4] To illustrate the decline in business and the increase in operating costs, Southern experienced a decline of more than 20% in revenue passengers in and out of Memphis between 1959 and 1963, while during the same period Southern's annual expenses at the Union Station rose from $490,377 to $535,354 (App. 59a-60a).

By way of contrast, Southern's expenses at the new facility were estimated to be just over $200,000 a year (App. 60a).

[5] Southern's station is located on its own tracks (App. 63a); MoPac's station is located on Union Railway tracks over which MoPac had existing rights of user (App. 48a, 50a); and the L&N, which has had the right to use tracks at the Illinois Central Station and has used them continuously since 1907 (App. 56a), reaches the Illinois Central Station from its own mainline track over Illinois Central switching tracks at the Illinois Central's station (App. 54a-56a).

that it was his "informal opinion that a railroad may not abandon operations over a line of another such carrier without approval under section 1(18), except to the extent it may be exempt as provided in that section or in section 1(22)," and suggesting that "in order to avoid a possible violation of the Interstate Commerce Act" the railroads consider filing "appropriate applications which may be accompanied by motions to dismiss for lack of jurisdiction" (App. 23a-24a). By written replies, dated March 24 and 25, 1964, both L&N and MoPac reiterated their view that the relocation of their Memphis passenger facilities was exempt from the requirement of prior Commission approval under Section 1(18) (App. 26a-27a, 31a-32a). No further communication was received from the Commission, and on April 1, 1964, each of the three railroads terminated operations at Union Station and commenced using station facilities at their new locations in Memphis.

On May 14, 1964, over seven weeks after these changes had been made, the Commission filed a complaint in the United States District Court for the Western District of Tennessee against Union Station, its proprietary railroads, and Illinois Central (App. 7a). The jurisdiction of the District Court was invoked under Sections 1(22) and 5(8) of the Interstate Commerce Act, 49 U.S.C. §§ 1(22), 5(8) (App. 8a).

The complaint alleged that on April 1, 1964, Union Station, MoPac, L&N and Southern had abandoned operations at Union Station without having first obtained from the Commission a certificate that the present and future public convenience and necessity permit of such abandonment, as allegedly required by Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), and prayed that the District Court issue an injunction, under Section 1(20) of the Act, 49 U.S.C. § 1(20), restraining those petitioners from

abandoning or contributing to the abandonment of the use and operation of Union Station's facilities.

The complaint also alleged that commencing April 1, 1964, L&N had instituted passenger service to and from the Memphis station of Illinois Central without having first obtained Commission approval, as allegedly required by Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), and prayed that the District Court issue an injunction, under Section 5(8) of the Act, 49 U.S.C. § 5(8), restraining L&N from using Illinois Central's station and station tracks.

Both the City of Memphis and the Railway Labor Executives' Association intervened as plaintiffs in support of the Commission's complaint (App. 37a-42a).

After a hearing on the Commission's motion for preliminary injunction, the District Court on June 12, 1964, issued a memorandum decision (230 F.Supp. 456, App. 173a-195a, Appendix B, *infra*, pp. 7a-25a), which was supplemented on July 6, 1964, by a letter to all parties (App. 199a-201a; Appendix B, *infra*, pp. 26a-28a). In the memorandum decision, the District Court concluded:

> (1) "that at least some of the tracks at Union Station do constitute a 'line of railroad' within the meaning of Sec. 1(18) of the Act and conversely are not 'spur' or 'switching' tracks within the meaning of Sec. 1(22); and further that the cessation of operations over these tracks constitutes an abandonment and not a mere relocation. Accordingly, Union Station, L&N, Southern and MoPac have abandoned a line of railroad in violation of the provisions of Sec. 1(18)."
>
> (2) "that some of the tracks at Illinois Central terminal are likewise a 'railroad line' within the meaning of Sec. 5(2) of the Act and conversely are not 'spur' or 'switching' tracks within the meaning of

Sec. 1(18) of the Act; and further that the institution of operations there by L&N constitutes an acquisition of trackage rights and not a mere relocation. Accordingly, L&N has acquired trackage rights over or joint use of a line of railroad in violation of Sec. 5(2) and 5(4) of the Act." (230 F.Supp. at 466-467, App. 192a, Appendix B, *infra*, p. 23a.)

After further hearing, the Court entered its final judgment on October 14, 1964 (App. 277a-283a; Appendix C, *infra*, pp. 29a-32a), which it amended on October 23, 1964 (App. 286a; Appendix C, *infra*, pp. 29a-34a). The judgment confirmed the prior findings of the memorandum decision and granted a Commission motion for summary judgment, in part, in that it permanently enjoined Union Station, MoPac, L&N and Southern, from "their continued abandonment" of a "line of railroad" at Union Station without approval of the Commission, and enjoined L&N and Illinois Central "from the continuation and effectuation of their arrangement for the acquisition of trackage rights over or joint use of" the Illinois Central's passenger station facilities unless and until such arrangement is authorized by the Commission. Those permanent injunctions were stayed pending appeal upon the posting of supersedeas bonds by petitioners Union Station, MoPac, L&N and Southern.

On appeal, the Sixth Circuit affirmed. Appendices D, E, *infra*, pp. 36a-55a. That Court's opinion rejected the petitioners' contention that the tracks involved in the cessation of operations at Union Station were, under Section 1(22) of the Interstate Commerce Act, exempt from the requirements of Section 1(18) as "spur . . . team, switching, or side tracks," and the related contention of petitioners L&N and Illinois Central that their institution of joint use of the Illinois Central station was, under Section 1(18), exempt from the requirements of Section 5(2) of

the Act because the Illinois Central tracks involved likewise were "spur . . . team, switching, or side tracks."[6] However the Court stayed the issuance of its mandate to June 22, 1966, to permit the filing of this petition for certiorari.

Reasons for Granting the Writ

1. *The Section 1(18) issue—the first question presented—should be reviewed by this Court.*

The decision below with respect to the application of Section 1(18) of the Interstate Commerce Act overturns what has been settled law for over 40 years; it is contrary to the intent of the Congress which enacted Section 1(18) in 1920, conflicts in principle with applicable decisions of this Court, and is opposed to a settled administrative construction of Section 1(18) which has been followed uniformly since the statute was first enacted. Whether the decision is right is a question of great importance to the nation's railroads which should be decided by this Court. For, if the decision below is right, the railroads will find themselves in violation of Section 1(18) for having discontinued passenger operations at particular stations without ICC approval on hundreds of occasions in the past, in reliance on the previously settled law.

a. Under the Interstate Commerce Act, the Interstate Commerce Commission has no power to approve or disapprove passenger station abandonments as such. Rather, as was recognized by the Court below, the Commission's only relevant power is the power vested in it by Section 1(18), which concerns only abandonments of *track*, not

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[6] The opinion did not discuss the further contention by L&N and Illinois Central that Commission approval under Section 5(2) was not required because L&N had had the right to use Illinois Central's track at the Memphis station since 1907 and had used it continuously in freight operations since that date (App. 54a-56a).

buildings. Section 1(18) provides that without Commission approval, no carrier by railroad "shall abandon all or any portion of a line of railroad, or the operation thereof." But, by virtue of Section 1(22) of the Act, the Commission's power under Section 1(18) does "not extend to the . . . abandonment of spur, industrial, team, switching, or side tracks, located . . . wholly within one state."[7]

Thus, whether Commission approval must be obtained before passenger operations at a station are discontinued by a carrier turns on whether an abandonment of track, other than "spur, industrial, team, switching, or side tracks," will result.

Railroad passenger stations are of three basic kinds. Some, found in smaller communities, are located beside the users' main line and have no separate terminal track for loading and unloading passengers. Passenger trains simply stop on the through track to load and unload passengers. Other stations —such as the Memphis Union Station—have sidings or "stub-end" spurs on which the loading and unloading of passengers is accomplished. They may also have other tracks used for such purposes as switching, car-storage, and train repair. Still others—such as the Union Station in Washington, D. C.—sit astride the main through tracks of the users, although they may also be equipped with additional "stub-end" terminal tracks. In such stations, passenger trains may enter from one direction, load and unload passengers, and continue on in the same direction.

It seems plain on the face of the statute that the abandonment of a station which has no tracks of its own is not subject to Section 1(18). It seems equally obvious that the abandonment of a "stub-end" station—such as Memphis Union Station—is not subject to Section 1(18) as long as

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[7] The tracks here involved are all located "wholly within" Tennessee.

mainline track outside the station is not also abandoned at the same time. The only abandonment is of tracks which cannot carry through traffic but instead are "stub-end" ("spur" tracks) and are used for loading and unloading, switching, and storage and maintenance purposes ("team", "switching", and "side" tracks). In petitioners' view, only when terminal tracks are also "through" tracks and thus not "spur, industrial, team, switching, or side tracks" —i.e., only when the terminal track of a "through" station is abandoned—is a station abandonment within the ambit of Section 1(18) and not exempt under Section 1(22).

Accordingly, it seems plain on the face of Section 1(18) and (22) that the discontinuance of operations at Memphis Union Station did not require Commission approval because no through or "mainline" track was abandoned. And, as we show in subsections (b) through (d) below, the legislative history of those provisions confirms that they were intended to mean just what they appear to mean—that the dispositive question is whether through or "mainline" track is abandoned—and repeated decisions by courts and the Commission have uniformly so held.

b. The legislative history of Section 1(18) demonstrates conclusively that, contrary to the decision below, the Congress which enacted Section 1(18) intended to give the Commission *no* jurisdiction over passenger station abandonments, apart from abandonments of through or "mainline" track.

All the provisions in the Interstate Commerce Act dealing with the jurisdiction of the Interstate Commerce Commission over the abandonment of a line of railroad or the operation thereof—49 U.S.C. § 1(18)-(22)—and the jurisdiction of the Commission over "terminal facilities"—49 U.S.C. §§ 1(15) and 3(5)—were added to the Act by Sections 402 and 405 of the Transportation Act of 1920, 41

Stat. 476, 479. Prior to that time, despite extensive regulatory authority over railroad rates, fares, and services, the Commission had not been granted any authority over construction or abandonment of track, station, or terminal facilities. The extent to which the Commission should be given jurisdiction over these subjects was a matter of heated dispute during the debate leading to enactment of the 1920 Act.

The original version of the Transportation Act of 1920, introduced by Congressman Esch of Wisconsin in 1919,[8] would have granted the Commission sweeping new powers over construction and abandonments. It contained the substance of what became Sections 1(18)-(21) of the Interstate Commerce Act, but prohibited *any* abandonment of a "line of railroad", or the operation thereof, without Commission approval.[9] There were no exemptions or exclusions.[10]

The proposal to give the Federal commission authority over extensions and abandonments evoked severe opposition from the state railroad commissions. At hearings on the Esch bill, the president of the National Association of Railroad and Utility Commissioners strenuously urged that the state commissions should have exclusive jurisdiction over all abandonment matters[11] and over all new construction of side tracks and spur, industrial, team, and switching tracks.[12]

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[8] H.R. 4378, 66th Cong., 1st Sess., June 2, 1919, reprinted in MacVeagh, *The Transportation Act of 1920*, pp. 517-28 (1923).

[9] H.R. 4378, 66th Cong., 1st Sess., June 2, 1919 (reprinted in MacVeagh, pp. 519-20).

[10] In addition, the Commission would have been granted the authority, in specified circumstances, to require "joint or common use of terminals" in emergencies as well as the general power to require "the terminals of any carrier to be open to the traffic of other carriers." *Id.*, Secs. 2 and 4 (MacVeagh, *supra*, pp. 519, 521). These were the precursors of the present Sections 1(15)(c) and 3(5) of the Interstate Commerce Act.

[11] Hearings on H.R. 4378, House Interstate and Foreign Commerce Committee, 66th Cong., 1st Sess., pp. 1606-11.

[12] *Id.*, pp. 1594, 1611.

The House committee refused to delete entirely the proposed grant to the ICC of authority over abandonments. It did, however, adapt the National Association of Railroad and Utility Commissioners' recommendation so as to exempt from the certificate requirement "the construction or abandonment of side tracks, or of spur, industrial, team or switching tracks * * * if such tracks or lines are located or to be located wholly within one State." [13]

The reason for giving the Interstate Commerce Commission only restricted jurisdiction over abandonments was explained on the floor of the House [14] by Congressman Esch, the chairman of the House committee and the sponsor of the bill. His statement makes clear the intent to withhold from ICC jurisdiction the abandonment of terminal tracks:

> "Railroads sometimes desire to surrender the rights granted by their charter. The traffic is not what they expected, business conditions change, the natural resources they thought first to get out to the open market become depleted or become exhausted. There is no power now to restrain abandonment under Federal law. Railroads in many States can do as they will. We provide that there shall be *some* Federal control

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[13] H.R. 10453, 66th Cong., 1st Sess., Nov. 8, 1918, Sec. 402 (reprinted in MacVeagh, *supra*, pp. 597-627).

[14] The House Report concerned itself solely with the need for Federal control over certain extensions. "Your committee believes that the requirement of such a certificate, so far as extensions are concerned, will tend to stabilize existing conditions and prevent the construction of unnecessary or parallel lines which, without any reasonable hope of profitable operation, would become a burden to the public. A similar provision in the laws of several states has proven successful in preventing the construction of weak lines. This provision of the bill, however, does not extend to the construction or abandonment of sidetracks, or of spur, industrial, team, or switching tracks, or of street car and electric interurban lines, if such tracks or lines are located or are to be located wholly within one State." H.Rep. No. 456, 66th Cong., 1st Sess., Nov. 10, 1919 (reprinted in MacVeagh, *supra*, pp. 218-19).

over the matter of abandonment, so that cities and villages that have been built up on these lines can be given due consideration by the regulatory body before the order for abandonment is issued. We give such control to the commission to investigate the situation and determine the facts. *But neither provision, the building of new lines or the abandonment of old ones, affects spurs or switches or terminal tracks* or interurban lines wholly within a State. *These we leave to State control, where they already belong.*" (58 Cong. Rec. 8316.)[15]

It is difficult to perceive a clearer exposition of the Congressional intent that abandonments of terminal track, at least insofar as they involve only "spurs" and "switches" not part of a through main line, were to be left to the discretion of the railroads concerned, subject only to such control as the states might exercise. Contrary to the view of the Court below (Appendix D, *infra*, p. 47a), that explanation was *authoritative*, by the author and floor manager of the bill, and the language of the bill as then explained was substantially the same as that finally enacted.[16]

If any doubts remained, however, they were set to rest shortly thereafter when the House considered what is now Section 3(5) of the Act, dealing with the Commission's power to require joint use of terminal facilities. As reported to the House, that provision gave the Commis-

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[15] Italics in quotations herein have been added unless otherwise indicated.

[16] On the House floor, the exemption provision was expanded to exclude all extensions or abandonments wholly within one state, leaving the Commission with jurisdiction over interstate track only. 58 Cong. Rec. 8538. The Senate, however, restored the version of the exemption drafted by the House committee. H.R. 10453, 66th Cong., 1st Sess., as amended by the Senate, December 20, 1919, Sec. 34 (MacVeagh, *supra*, pp. 681, 684). The conference report approved the Senate's action, H. Rep. No. 650, 66th Cong., 2d Sess., Feb. 18, 1920 (MacVeagh, *supra*, p. 219).

sion discretionary authority to require that railroad terminals be open to other carriers on prescribed conditions, but it did not require Commission approval in each case before a carrier could change its terminal arrangements.[17]

On the floor of the House, Congressman McClintic of Oklahoma proposed the following amendment to this section:

> "Provided, further, That the commission is hereby given authority to require a carrier to maintain his present arrangement or to make new arrangements relative to the joint use of depots, upon such terms as shall be found by the commission to be just and reasonable. *No carrier shall be allowed to discontinue the use of a depot in connection with another carrier until proper application has been made to the commission*" (58 Cong. Rec. 8578).

Explaining his amendment, Congressman McClintic expressed fear that many railroads would withdraw from joint terminal arrangements which had been required while the railroads were under Federal control during and after World War I. "The object of my amendment," he said, "is to cause any railroad company *before* it withdraws from the present use of a union depot to make application to the commission and receive a favorable report before any action can be taken." (*Ibid.*) In response to a statement of Congressman Black of Texas that depot facilities had been traditionally and should be regulated by the state commissions, Congressman McClintic said that since the bill "practically does away with all the jurisdiction of the State corporation commission," the public's only recourse against the abandonment of depots would be to the limited authority of the ICC

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[17] H.R. 10453, 66th Cong., 1st Sess., November 8, 1919, Sec. 405 (reprinted in MacVeagh, *supra*, p. 616).

in what is now Section 3(5). 58 Cong. Rec. 8579. Congressman Esch immediately sought to reassure the House that this was not the case. He noted that while the bill gave the Commission limited authority to require joint use of terminals, this did not divest the states of jurisdiction:

> "[T]he matter which the gentleman from Oklahoma seeks to reach by his amendment lies almost wholly within the police power of the several States. There have been amendments offered to this bill seeking to preserve such police powers. The committee in framing the bill has sought not to encroach upon such powers. The matters of depots and joint use of depots is practically in the jurisdiction of the State commissions, and all but one of the States have such commissions. In such small matters the detail should be left within the jurisdiction of the State authorities, who know the situation, know the conditions, and know how best to meet the needs." (*Ibid.*)

The purpose of what is now Section 3(5), Congressman Esch elaborated, was applicable to terminals in large cities. "Due to the prohibitive cost of land, it is necessary to get a greater use out of existing terminals by giving to some regulatory authority, like the Interstate Commerce Commission, the right to order the joint use of such terminals." Otherwise, he added, jurisdiction as to depots "should be left, as we leave it, to the regulatory bodies of the several States." (*Ibid.*)

The McClintic amendment, which would have prohibited the abandonment of depots used jointly with another railroad without prior application to, and approval by, the Commission, was rejected by a voice vote of the House (58 Cong. Rec. 8582). This action is persuasive that Congress did not intend to achieve the same result in Section 1(18). In view

of the floor leader's statement as to the purpose of Section 1(22) (pp. 13-14, *supra*), the rejection of the amendment cannot be dismissed as the Court below dismissed it (Appendix D, *infra*, p. 46a), as relevant only to the abandonment of buildings. The floor leader's statements and the argument on the floor of the House demonstrate that, except for the discretionary ICC authority in Section 3(5) to require joint use of terminal facilities in limited circumstances,[18] Congress intended to leave the matter of abandonment of stations and terminal facilities to the discretion of the railroads, subject only to such regulation as the states themselves might see fit to impose. This intention was reaffirmed as recently as 1958 when substantial amendments were made in other parts of the Act, but a proposal to require approval of station abandonments was rejected. See H. Rep. No. 1922, 85th Cong., 2d Sess., p. 12. In short, Congress did not mean the requirement of ICC approval of the abandonment of a "line of railroad," in Section 1(18) to encompass what was ordinarily considered to be "terminal track"; such track was intended by Congress to be exempt under Section 1(22).

c. Four years after the enactment of Section 1(18) and (22), this Court had occasion to construe those provisions in *Railroad Commission* v. *Southern Pacific Co.*, 264 U.S. 331 (1924), a decision with which the decision below conflicts in

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[18] As reported and passed by the House, this section authorized the Commission to "require the terminals" of any carrier subject to the Act "to be open to the traffic of other such carriers." H.R. 10453, Nov. 8, 1919, Sec. 405 (MacVeagh, *supra*, p. 616); H.R. 10453, Nov. 17, 1919, as printed in the Senate (MacVeagh, *supra*, p. 645). The Senate substantially changed this language so to authorize the Commission "to require the use of any such terminal or other facilities including mainline track or tracks for a reasonable distance outside of such terminals." H.R. 10453, Dec. 20, 1919, as amended by the Senate, Sec. 11(b) (MacVeagh, *supra*, p. 667). The final language, more closely akin to the Senate version, was agreed upon in conference. See H. Rep. 650, 66th Cong., 2d Sess., Feb. 18, 1920 (MacVeagh, *supra*, p. 252).

principle. In that case, this Court held that the application of Section 1(18) to the construction or abandonment of a union station and its access track turns on whether an expensive extension or abandonment of main line is involved.

The *Southern Pacific* case was one of three cases, arising in the state courts shortly after the enactment of the Transportation Act of 1920, which required a precise determination by the courts and the Interstate Commerce Commission of the dividing line between State and Federal jurisdiction with respect to the construction and abandonment of terminals. In each case a state agency had ordered the construction of a new union station—one in Los Angeles, one in Selma, North Carolina, and one in Oklahoma City. In each case, the railroads contested the state orders on the ground that Sections 1(18) and 3(5) of the Interstate Commerce Act gave the Interstate Commerce Commission exclusive jurisdiction with respect to such matters.

In the Los Angeles case, the California Supreme Court upheld the protesting railroads, ruling that the ICC had exclusive jurisdiction to order, approve or disapprove proposed station and track construction and abandonments. *Atchison, T. & S.F. Ry.* v. *Railroad Commission,* 190 Cal. 214, 211 Pac. 460 (1922). The California Railroad Commission then brought the case to this Court. Before it was briefed here, however, the North Carolina and Oklahoma Supreme Courts reached contrary conclusions in the Selma and Oklahoma City cases, the North Carolina court attaching particular significance to the rejection of the McClintic amendment. *North Carolina Corp. Comm.* v. *Southern Ry.,* 185 N.C. 435, 117 S.E. 563 (1923); *Chicago, R.I. & P. Ry.* v. *State,* 90 Okla. 173, 217 Pac. 147 (1923). The California Commission relied heavily on the Selma and Oklahoma decisions in its briefs in this Court.[19]

[19] In addition—indicating the importance of the case in defining the extent of federal jurisdiction—the National Association of Railway and

In its reply brief, the Southern Pacific advanced for the first time what ultimately became the *ratio decidendi* of this Court's decision. Quoting extensively from *Detroit & M. Ry.* v. *Boyne City, G. & A.R.R.*, 286 Fed. 540 (E.D. Mich. 1923), which had held the Section 1(22) exemption inapplicable where a "main line" was involved, Southern Pacific relied on the fact that the California Commission's order directly affected "mainline" tracks and hence was subject to the ICC's jurisdiction:

> "In the case at bar not only will a considerable portion of the main line of the Southern Pacific Company have to be 'abandoned' but the main lines of all of the three companies concerned will have to be 'extended' if they are required to construct a union passenger terminal station."[20]

This Court affirmed the California judgment setting aside the state Railroad Commission's order. However, it did so on far narrower grounds than the California court had adopted. Two facts controlled the Court's decision: first, the state agency's order to build a new union station involved the abandonment and construction of "main" tracks, and second, the project involved major expenditures by the railroads affected. Those factors, in the Court's judgment, required prior Commission approval under Sec-

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Utilities Commissioners filed a brief *amicus curiae* on behalf of the railroad commissions of 30 states, in which it cited the conflict between the Los Angeles decision and those in the Selma and Oklahoma City cases, and asked this Court for a "clear declaration" on the jurisdictional issues. Brief Amici Curiae, No. 283, Oct. Term 1923, pp. 36-37. In defense of the California Commission's exclusive jurisdiction, NARUC dealt extensively with both the legislative history of the Transportation Act of 1920, particularly the McClintic amendment (*id.* at 14-20), and the decisions by the North Carolina and Oklahoma Supreme Court (*id.* at 28-36).

[20] Reply Brief of Respondent Southern Pacific Co. to Brief Amici Curiae, filed November 19, 1923, pp. 16-21.

tion 1(18) for the abandonment and construction of the main tracks involved.

The California court had not sought to distinguish between "main" tracks and the "spur", "switching" and "side" tracks involved. This Court, however, in its statement of the facts laid considerable emphasis on the "main track" of each railroad that would have to be abandoned and constructed. 264 U.S. at 340. The sole authority for ICC jurisdiction, it indicated, rested in the certificate requirements of Sections 1(18)-(21). "Such a certificate", the Court concluded, is "necessary in the construction of a new interstate union station, which involves a substantial and expensive extension of the *main tracks* or lines of interstate carriers who theretofore have maintained separate terminals.". *Id.* at 344.

The Court then explained why the Section 1(22) exemption was inapplicable. Brushing aside the Railroad Commission's argument based on the legislative history of the Transportation Act of 1920, that *all* terminal track came within this exemption, the Court found "a palpable distinction between the *main tracks* of an interstate carrier, and its spur, industrial, switching or side tracks, . . . [which] shows the legislative intention to retain any substantial change in the *main tracks* within the control of the Interstate Commerce Commission."[21] *Id.* at 345.

In answer to the Railroad Commission's argument based on the Selma case, the Court remarked: "One might, too,

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[21] Recognizing that mainline tracks were indisputably involved, the Railroad Commission had also cited the ICC's decisions holding that the relocation of main line track for short distances did not constitute a "construction" and "abandonment" requiring a certificate under Section 1(18). *Philadelphia, N. & N.Y.R.R.*, 67 I.C.C. 252 (1921); *Pearl River Valley R.R.*, 67 I.C.C. 748 (1921). The Court distinguished these cases, remarking, "it may well be that a mere relocation of a main track of an interstate carrier which does not involve a real addition to, or abandonment of, main tracks and terminals, or a substantial change in destination, does not come within the paragraphs 18 to 21." 264 U.S. at 345.

readily conceive of railroad crossings or connections of interstate carriers in which the exercise by a state commission of the power to direct the construction of merely local union stations or terminals without extensions of *main* tracks and substantial capital outlay should be regarded as an ordinary exercise of the police power of the State for the public convenience and would not trench upon the power and supervision of the Interstate Commerce Commission in securing proper regulation of an interchange of interstate traffic or passengers." *Ibid.* (In the Selma case, no abandonment or construction of main line track had been involved, only the abandonment of an old station building and the construction of a new union station at the point where the main lines of the affected railroads crossed. See *North Carolina Corp. Comm.* v. *Southern Ry.*, 185 N.C. 435, 117 S.E. 563 (1923).)

"But," the Court's opinion continued, "there is a great difference between such relocation of tracks or local union stations and what is proposed here. The differences are more than that of mere degree; they and their consequences are so marked as to constitute a change in kind. They come within paragraphs 18 to 21 * * * and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the State Commission." 264 U.S. at 346. The Court thereupon concluded, "We think it clear that in such an extension of *main lines* with their terminals the Interstate Commerce Commission is required by the act to make a finding that the expense involved will not impair the ability of the carriers concerned to perform their duty to the public." *Id.* at 347.

The decision of the Supreme Court clearly confirmed the absence of ICC jurisdiction in the Selma case, where neither the abandonment nor the extension of main track was involved. It left for the Commission itself to decide whether

the abandonments and extensions of track in the Los Angeles and Oklahoma City cases, where abandonment and extension of main tracks were involved, constituted a "substantial change in the main tracks within the control of the Interstate Commerce Commission."

The Los Angeles and Oklahoma City cases reached the Commission for decision on the Section 1(18) issues in mid-1925. In its decisions, the Commission—which by then included former Congressman Esch—emphasized that its powers under Section 1(18) as enacted by Congress and construed by this Court in the *Southern Pacific* case were limited to cases involving substantial extensions and abandonment of "main" track. *Los Angeles Passenger Terminal Cases,* 100 I.C.C. 421, 428-429, 459-60 (1925); *Corporation Commission* v. *Atchison, T. & S.F. Ry.,* 101 I.C.C. 647, 650-53 (1925). In the *Los Angeles Passenger Terminal Cases* the Commission expressly approved the holding by the North Carolina Supreme Court in the Selma case that the transfer from one station to another located on the railroad's "main line" was clearly exempt from Section 1(18), and held that where the change to a new station involved an "expensive extension of the main tracks" and, conversely, an abandonment of former "main tracks", ICC approval under Section 1(18) was a prerequisite to the change. The *Oklahoma City Union Station Case* (*Corporation Commission* v. *Atchison, T. & S. F. Ry., supra*) held that the ICC's sole "means of control" over the construction or abandonment of passenger stations rested on the requirement that there be a substantial extension or abandonment of "main tracks" and that in consequence neither the abandonment of joint use of a former station nor the construction of a new station was within the Commission's jurisdiction under Section 1(18) where no new mainline construction was involved and the track being abandoned was a "stub-end" or "spur."

The limits of ICC's jurisdiction over the abandonment

or construction of stations were clearly drawn in these cases. Whether abandonment and construction of terminal track requires ICC approval was the precise question at the heart of this Court's opinion in the *Southern Pacific* case, and necessarily so. The California court's opinion had swept all of the various track abandonments and extensions involved into the ICC's jurisdiction. This course was incompatible with the clear language of the act and its legislative history. This Court thereupon substituted what it considered to be the proper test: the construction of track to a terminal was *within* the Commission's jurisdiction if it involved "a substantial and expensive extension of the *main* tracks." 264 U.S. at 344. Otherwise, if it were but a minor relocation of main track or if no main track were involved, the Commission had no jurisdiction under Section 1(18). And this is precisely the interpretation that the Commission itself put on the decision in its subsequent disposition of both the Los Angeles and Oklahoma City cases. Thus, there is a clear conflict in principle between the decision below, on the one hand, and this Court's decision in the *Southern Pacific* case (and the Commission's own decisions in the related cases), on the other.

d. The decision below conflicts with the settled construction of Section 1(18) to which the Interstate Commerce Commission itself has adhered for over 40 years, ever since its decision in the *Los Angeles Passenger Terminal Cases*, 100 I.C.C. 421 (1925).

Since the Transportation Act of 1920 was enacted, over 400 million train-miles of passenger train service have been discontinued in this country. As of 1963, only 189 million passenger train-miles were still being operated.[22] If, in the

[22] See *Railroad Passenger Train Deficit*, 306 I.C.C. 417, 440 (1959); 78th Annual Report of the Interstate Commerce Commission, p. 146 (1964). During the year 1920, Class I Railroads operated 588 million train-miles in passenger service. I.C.C., *Statistics of Railways in the United States*, p. III 33 (1922).

discontinuance of over two-thirds of the nation's passenger train service since Section 1(18) became effective—necessarily involving the abandonment of many hundreds of passenger stations[23]—there existed legal precedents that abandonment of a passenger station or its track required prior approval by the ICC, where no mainline track was involved, the listing of citations would fill a book. However, the opinions below offer no such citations.[24]

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[23] In 1920, passenger train service was provided over 175,226 miles of road by Class I line-haul railroads. I.C.C., *Statistics of Railways in the United States*, Table 55-B (1941). The miles of road over which such service was provided declined to 82,036 by the first half of 1964. 78th Annual Report of the Interstate Commerce Commission, p. 146 (1964).

[24] Among the cases cited by the Court of Appeals (Appendix D, *infra*, p. 45a), two establish no more than that terminal companies are carriers within the meaning of the Interstate Commerce Act. *St. Joseph Union Depot Co.*, 133 I.C.C. 537 (1927); *Fort Worth Union Passenger Station Co.*, 97 I.C.C. 698 (1925). Petitioners do not quarrel with that proposition. *Atchison, T. & S.F. Ry.*, 224 I.C.C. 39 (1937), establishes that under the Act as it was then written an agreement for operation and control of such a carrier by others required ICC approval. The exception in Section 1(22) was not applicable to such an agreement. In *St. Louis, S.F. & T. Ry.*, 267 I.C.C. 30 (1946), the ICC's jurisdiction was not challenged. The assumption of jurisdiction over acquisition of trackage rights for the purpose of establishing passenger service to a city not then served by the carrier does not govern the relocation of terminals for existing service, nor does it apply to abandonments of terminal tracks, as shown by the fact that the trackage rights there authorized were later allowed to be relinquished without Section 1(18) approval. See *St. Louis-S.F. Ry.*, 307 I.C.C. 477 (1959). *Illinois Central R.R.*, 307 I.C.C. 493 (1959), 312 I.C.C. 277 (1960), 317 I.C.C. 502 (1962), *vacated sub nom. Norfolk & W. Ry.* v. *United States*, 241 F. Supp. 974 (E.D. Ohio 1965), *prob. juris. noted*, 382 U.S. 913 (Nov. 16, 1965) (Nos. 445, 448, 543, O.T. 1965), involving construction of new lines, extension of freight service, and acquisition of trackage rights for freight service into a distinct area not theretofore served by the applicants, is in no way analogous to the case at bar. The cases cited by the District Court (230 F. Supp. at 464, App. 187a, Appendix B, *infra*, pp. 18a-19a) are also not in point. No extension or abandonment of track was involved in *Boston Term. Co.*, 312 I.C.C. 373 (1960), only sale of the terminal building over which the ICC held that it had no jurisdiction. *Id.* at 376-379. The dictum that "'a line of railroad' does not cease to be such merely because it is called, or embraced within, a 'station,'" *id.* at 377, does not contradict petitioners' assertion in the text above. The dictum is correct when applied to mainline track. *Kansas*

On the contrary, the Commission has never, in a proceeding in which its jurisdiction was contested, asserted jurisdiction under Section 1(18) over a station abandonment which did not also involve the abandonment of mainline track. And, it has repeatedly dismissed, for want of jurisdiction, applications for Section 1(18) authority with respect to station abandonments which did not involve mainline track.

Thus, in the *Oklahoma City Union Station Case* (*Corporation Commission* v. *Atchison, T. & S.F. Ry., supra*), the Commission dismissed the proceedings with respect to all of the affected railroads except the "Frisco" on the merits; with respect to the "Frisco," which would not have been required to extend or abandon mainline tracks but only to build a "stub-end" access track several blocks long, the proceeding was dismissed on the ground that an ICC certificate was not required. 101 I.C.C. at 656. The Commission has also dismissed applications for Section 1(18) authority under similar circumstances in *Kansas City S. Ry.*, 94 I.C.C. 691 (1925); *Boston & A.R.R.*, 312 I.C.C. 458, 461 (1961); and *Seaboard Air Line R.R.*, 312 I.C.C. 507, 511 (1961), *vacated on other grounds sub nom. Railway Labor Executives' Ass'n* v. *United States*, 216 F. Supp. 101 (E.D. Va. 1963).

City Southern Ry., 94 I.C.C. 691 (1925), involved relocation of mainline tracks. *Cf.* note 21, *supra*. The phrase "terminal tracks" used in the opinion, *id.* at 693, apparently reflects the fact that the segment involved was at the end of the line and a station building was there. No contention based on the Section 1(22) exception was even made. The opinion in *Chicago, R.I. & P. Ry.*, 131 I.C.C. 421 (1927), uses "terminal" to refer to "terminal tracks," *id.* at 429, and the "terminal tracks" in question were the carrier's only access to existing station facilities in Denver; by abandoning those tracks, the carrier admittedly would have been left unable to provide railroad service to Denver, at least for a while. Thus the "terminal tracks" performed the essential function of mainline tracks for this carrier. In contrast, railroad passenger service at Memphis continued without interruption after the Union Station closed, and petitioners continue to use their main lines as before.

Moreover, whenever the last passenger train is discontinued on a particular route, every passenger station on the route is necessarily "abandoned." Yet, in a number of recent decisions involving hundreds of passenger stations, the Commission has approved the discontinuance of carriers' last passenger trains under Section 13a of the Interstate Commerce Act, added by 72 Stat. 571 (1958), 49 U.S.C. § 13a, without intimating that Section 1(18) approval should also be obtained.[25]

Thus, the Cotton Belt (which ceased using Union Station on November 1, 1952) gradually eliminated all of its passenger train service between World War II and 1959, successfully invoking ICC jurisdiction under Section 13a of the Interstate Commerce Act to discontinue the last remnants of its former St. Louis-Dallas passenger route. *St. Louis S.W. Ry.*, 307 I.C.C. 639 (1959). The Commission's opinion noted that Cotton Belt's passenger train operations between Texarkana, Texas, and Dallas, Texas, had been discontinued prior to 1956, between Pine Bluff, Arkansas, and Texarkana on December 21, 1957, and into and out of Union Station in St. Louis, Missouri, in 1958. *Id.* at 640-41. A review of the Commission's Section 1(18) decisions reveals that no prior ICC approval had been obtained to abandon operations at any of the many passenger stations involved. Further, the Commission granted Section 13a authority to the Cotton Belt to discontinue its trains completely between East St. Louis, Illinois, and Pine Bluff, Arkansas, which involved the Cotton Belt's abandoning the

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[25] Such decisions cannot be distinguished on the ground that Section 13a approval obviates the need for Section 1(18) authority, for the Commission has held that where an "abandonment" subject to Section 1(18) will result, Section 1(18) authority must be sought and obtained before the Commission will act on a Section 13a application. *Baltimore & O.R.R.*, 317 I.C.C. 371, 387-389 (1962) (abandonment of mainline track of Cleveland Union Terminal, a "through" station, see *Cleveland Passenger Terminal Case*, 70 I.C.C. 342, 659 (1921)).

use of twenty-three passenger stations, without mentioning Section 1(18).

Similarly, on one recent occasion the Chicago Great Western sought Section 13a authority to discontinue passenger trains serving some 50 passenger stations, including union depots in three cities. Later, Chicago Great Western sought Section 13a authority to discontinue passenger trains serving 66 stations, including joint depots in three cities. In both cases, the Commission granted the requested authority without suggesting that Section 1(18) approval was also necessary for the abandonments. *Chicago Great Western Ry.*, 317 I.C.C. 99 (1962); *Chicago Great Western Ry.*, ICC Finance Docket No. 23581 (August 19, 1965). And when the Chicago & Northwestern sought permission to discontinue its last passenger trains to St. Paul and Minneapolis, the state regulatory commission moved to dismiss the application for failure to request Section 1(18) authority. Yet the Commission summarily denied the motion and granted the Section 13a permission requested. *Chicago & N.W. Ry.*, 320 I.C.C. 85, 92 (1963).[26]

In short, until this case, the Commission has, consistently adhered to its decision in the *Los Angeles Passenger Terminal Cases*, that it has no jurisdiction over passenger station construction or abandonments in the absence of a substantial extension or abandonment of "main tracks." The

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[26] The Commission's attitude was the same even before the enactment of Section 13a. Thus, in 1926, when the Pennsylvania Railroad terminated Baltimore & Ohio's right to operate into Penn Station via the Hudson River tunnel, the B. & O. arranged to share the Central of Jersey's passenger terminal in Jersey City. Although the ICC asserted jurisdiction to approve the trackage right agreement by which the B. & O. operated from Philadelphia to Jersey City, it never once intimated that the B. & O. had violated Section 1(18) in abandoning its operations into Penn Station without Commission approval. See *Baltimore & O.R.R.*, 138 I.C.C. 171 (1928); *Transfer of Passengers Through New York, N.Y., & Newark, N.J.*, 165 I.C.C. 497, 498 (1930).

decision below is squarely in conflict with that settled administrative constructon.

e. Whether the decision below is right—and for reasons indicated above we believe it is not—is a question of great importance to the nation's railroads. If the decision below is right, a railroad must obtain Section 1(18) approval whenever it discontinues passenger operations at a station where passengers are loaded or unloaded from terminal tracks which the railroad will no longer use. (This is true whether or not other railroads continue to use the tracks for terminal operations, for the question of abandonment turns on the use to which any particular railroad puts the tracks. *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134, 144 (1946).) If that is now to be the law, virtually every railroad in the United States will suddenly find itself in violation of the Interstate Commerce Act.

As noted above, in the years since Section 1(18) was enacted, passenger service has been discontinued by any number of railroads over thousands of miles of track at hundreds of different stations without Section 1(18) approval. Some terminal track must have been involved in many of these abandonments. If the decision below is right, countless "'abandonments'' for which ICC approval was required have occurred without such approval. If, despite 45 years of law to the contrary, those past abandonments are now to be declared to have been unlawful—subject to both civil restraint and criminal punishment—and similar abandonments in the future are no longer to be exempt under Section 1(22), it should be this Court, or indeed the Congress, which so declares.

2. *The Section 5(2) issue—the second question presented —should be reviewed by this Court.*

In terms of the legal issues involved, the second question presented by the petitioners, concerning the application of Section 5(2) of the Interstate Commerce Act, is virtually identical to the first question presented, concerning the application of Section 1(18).[27]

As previously indicated, Section 1(18) provides that no carrier by railroad "shall abandon all or any portion of a line of railroad, or the operation thereof," without Commission approval, but by virtue of Section 1(22) that provision does not apply to the "abandonment of spur, industrial, team, switching, or side tracks, located . . . wholly within one State." Whether "stub-end" station tracks like those at the Memphis Union Station, used only for the loading and unloading of passengers and the switching, storage, cleaning and repair of cars, are exempt as "spur, . . . team, switching, or side tracks" is the issue presented by petitioners' first question.

Similarly, Section 5(2), as supplemented by Section 5(4), requires Commission approval "for a carrier by railroad to acquire trackage rights over, or . . . joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto," but by virtue of Section 1(18) that provision does not "prohibit the making of contracts between carriers . . . without the approval of the Commission, for the . . . use of spur, industrial, team, switching, or side tracks." And, whether "stub-end" station tracks like the switching tracks at the Illinois Central station, which under the new arrangements are used by the L&N only for the loading and unloading of passengers and

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[27] It should be noted that only the L&N and the Illinois Central are directly affected by the Section 5(2) issue.

the switching, storage, cleaning and repair of cars, are exempt as "spur, . . . team, switching, or side tracks" is the issue presented by petitioners' second question.

In view of the virtual identity of the legal issues presented by the two questions, we submit that review of the Section 5(2) question is warranted if certiorari is granted with respect to the Section 1(18) question.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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